No. 20,323

United States Court of Appeals

For The Ninth Circuit

Hartford Fire Insurance Company
a corporation,

Appellant,

vs.

O. T. JONES and RUBY I. JONES,

Appellees.

APPELLEE'S BRIEF

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STATEMENT OF PLEADINGS

I. Jurisdiction of the Court.

Appellant has appealed from that portion of a judgment directing a finding of liability against appellant after a trial in the United States District Court for the District of Idaho, Eastern Division, before the Honorable Fred M. Taylor, District Judge, in an action in declaratory relief to determine the rights, liabilities, duties, responsibilities and legal relationship of the parties under the provisions of a policy of fire insurance issued by Appellant.

Jurisdiction of the cause below was founded on diversity of citizenship and amount in controversy, pur-

suant to sections 1332, 1391, 2201 and 2202, Title 28, United States Code.

The pleadings show that defendants, O. T. Jones and Ruby I. Jones, each was a citizen of the State of Idaho, while plaintiff, Hartford Fire Insurance Company (hereinafter "Hartford") was a corporation organized under the laws of Connecticut, with its principal place of business in Connecticut and authorized to conduct insurance business in the State of Idaho; the matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00 (C.T. pp. 3-4, 6-32, 37, 47.) [1]

([1] "C.T." refers to clerk's transcript of record designated as Volume 1 in this record on appeal.)

II. Pleadings.

The pleadings consist of a complaint in declaratory relief filed by Appellant; Answer and Cross-Complaint filed by Appellees, and Answer to Cross-Complaint filed by Appellant. (C.T. 3-17)

A. Complaint in declaratory relief.

In its complaint in declaratory relief Appellant, Hartford,, alleged its corporate existence under the laws of Connecticut and its authority to conduct an insurance business in the State of Idaho. It alleged that Appellees were the owners of a motel building situated one and one-half miles west of Arco, Idaho and all the personal property located therein with the exception of some personal property located in one unit of the motel; execution of a standard Idaho fire insurance policy insuring Appellees against loss by fire to said motel up to a limit of liability of $28,000 and loss by fire to personal property located therein up to

a limit of liability of $7,000, with a lender's loss payable endorsement, making the loss payable first to the Standard Insurance Company, as its interest may appear; that on June 11, 1963 the motel and personal property were wilfully set on fire, and receipt of a sworn statement of Proof of Loss executed by Appellees wherein they claimed the sum of $21,212 as building loss and the sum of $5,000 for loss of personal property. It further alleged upon information and belief that Appellees entered into a conspiracy to defraud Appellant by wilfully causing said fire and filing a false and fraudulent sworn statement of proof of loss; that pursuant to said conspiracy, Appellees wilfully caused the fire, and filed a false and fraudulent proof of loss wherein they denied knowing the cause of the fire; that they had done nothing to violate the conditions of the policy or attempt to deceive the company, and that Appellees overstated the amount of loss and damage; that Appellees had violated provisions of the policy relating to Concealment, Fraud, duty of insured to save and preserve the property, and increase hazards; that the actual cash value and amount of loss was substantially less than that claimed by Appellees; that an actual dispute and present controversy existed in as much as Appellant contends that it was under no obligation to pay any insurance proceeds to Appellees by virtue of said violations and the fraudulent conspiracy. Appellant additionally contended that it should be indemnified by Appellees for any amount Appellant was obligated to pay to said loss payee, Standard Insurance Company. (C.T.PP.3-6)

B. Answer.

In their answer, Appellees admitted all the allegations of the complaint, except they denied wilfully

causing said fire, denied violating the provisions of the policy, denied filing a false and fraudulent sworn statement in proof of loss, and denied all allegations of conspiracy and all knowledge as to the cause of the fire. They alleged that if said fire was wilfully caused by some person said loss was still covered under the terms of the policy and that a dispute and controversy existed because Appellant refused to pay the amount due under the terms of the policy. (C.T. pp. 8-9).

C. Cross-Complaint.

In their cross-complaint, Appellees realleged the facts as to citizenship, amount in controversy; ownership of the property subject only to the interest of a mortgagee, Utah Mortgage Loan Company; existence of a standard Idaho fire insurance policy with the terms and limits as set forth in the complaint which was in effect on the date of the fire; the fact of fire; timely filing of a sworn statement in proof of loss; compliance with all covenants and conditions of the policy, demand for payment in the amount of $30,000 and $2,000 as attorney's fees, and failure to pay (C.T. pp.11-13.)

D. Answer to Cross-Complaint.

In its answer to the Cross-Complaint, Appellant admitted the allegations as to citizenship; the existence of a standard Idaho fire insurance policy; the fact of fire; receipt of the sworn statement in proof of loss filed by Appellees and demand for payment and refusal by Appellant. All other allegations were denied, either specifically or because of insufficient knowledge or information on the part of Appellant. Appellant further re-alleged, re-adopted and re-affirmed the allegations contained in its complaint in declaratory

relief as an affirmative defense to Appellees' cross-complaint. (C.T.pp.14-16.)

STATEMENT OF THE CASE

This is an action on an Idaho standard form fire insurance policy with endorsement covering vandalism and malicious mischief (Ex. 1). Appellant contended that Appellees conspired to defraud Appellant by setting the fire and then submitting a false proof of loss. Appellant further contended that Appellees, having set the fire, were guilty of fraud, concealment, and false swearing as to material facts and circumstances.

Appellees denied that they set the fire, or had any knowledge concerning its origin, and denied any and all concealment, fraud or false swearing. Appellees did not take issue with Appellant's contention that the fire was of incendiary origin since the Appellees had no knowledge concerning its origin. Appellees did contend that they were entitled to recover their losses even though the fire were of incendiary origin.

About 2:05 A.M. on June 11, 1963, the Arco Fire Department received a call for a fire at the Motel owned by Appellees, Mr. and Mrs. O. T. Jones. (R.T. 14) [2]. ([2] "R.T." refers to reporter's transcript designated as Volume 2 in this record on appeal). The fire appeared to have been of incendiary origin, or a "set fire", since the electric stoves were in the "on" position in all apartments, fires apparently started independently in all four apartments, and petroleum products had apparently been applied to cloth and rugs in the apartments to spread the fires. Mr. Steve Kennedy, Special Agent for the National Board of Fire Underwriters and a witness for Appellant testified at length

he had investigated this fire and that it was in his opinion a "set fire". Appellees did not take issue with this opinion in any particular.

The fire was intense when the firemen arrived at the scene. The motel was greatly damaged by the fire which took three hours to extinguish. (R.T. 18.)

The motel consisted of four separate living units. One unit was rented at the time of the fire, but the tenant was apparently not in Arco on the night of the fire. (R.T. 109.) He had a key to apartment number 2. (R.T. 109).

The apartments each had separate outside entrances and were not connected by doors. The two center units had windows on the front and rear walls; the end units had windows on the side as well as the front and rear. (R.T. 168-169.) In the ceiling of each unit there was a covered opening or "crawl hole" which led into a common attic. The openings were approximately eighteen by twenty six or thirty inches in size and large enough for a person to crawl through (R.T. 32.) At the time of the fire at least three of the holes were "open" into the attic. Because the ceiling had fallen into the fourth apartment it could not be determined whether that hole was open (R.T.31). The crawl holes were designed for persons to enter the attic from each apartment, and having entered the attic, a person had unobstructed access to each unit through the "crawl holes". (R.T. 31, 32, 33.)

When the firemen arrived at the scene a window on apartment number four, at the opposite end of the motel from the highway, was found to be unlocked. It was about chest high from the ground and large enough to crawl through. In fact the assistant fire chief was "going to crawl into it" when the chief told

him it was unnecessary. A can or kettle to stand on was found upside down under the window. (R.T. 34, 35, 77.) Each apartment contained chairs, a dresser and a chest of drawers making access to the "crawl holes" quite easy. (R. T. 186, 207.)

After the fire it was discovered that a refrigerator, bed, and metal springs were missing from apartment number three, and a ladder, metal bed, and other items were missing from apartment number one. They were never found. (R.T. 210,211.)

After the fire empty beer bottles and whiskey bottles were found in the motel (R.T. 35, 38, 39), although the Appellees do not drink (R.T. 205) and the bottles were not there the last time Mrs. Jones was in the motel before the fire (R.T. 205). On Saturday, June 8, 1963, Appellee, Mrs. Ruby Jones was in the motel cleaning it and getting it ready for tenants who had contracted to rent the unoccupied units the last of June. (R.T. 203,204.) This was the last time she was in the motel prior to the fire (R.T. 203.)

On June 10, 1963, Appellees left Arco on business for Jerome and Caldwell, Idaho, (R.T. 170-171.) They spent the afternoon and evening in Jerome and Wendell and then drove to Shoshone, Idaho, arriving there about eleven (R.T. 175-176.) They stayed at a motel in Shoshone that night, retiring about midnight (R.T. 176-178.) They left the next morning for Caldwell, Idaho, arriving there about eleven in the morning. There they learned of the fire, their daughter having phoned earlier to a business client there. (R.T. 179.) They had intended to visit in Caldwell, but upon learning of the fire, drove back to Arco the same day, arriving about six-thirty in the evening (R.T. 180.)

Upon arriving at Arco they found the motel "board-

ed up" and were told by a man who was "boarding it up" that he was ordered to keep everybody out (R.T. 181). The insurance adjuster for Appellant had ordered the motel "boarded up" (R.T. 70). Appellee, Mr. O. T. Jones, telephoned the insurance adjuster (R.T. 78,181) and he contacted the sheriff and the chief of police and his attorney who went with him into the motel two days after the fire (R.T. 182).

Appellees had lived in Arco twenty-six years; and they had raised four children (R.T. 155). Appellee Jones had been a licensed auctioneer for twenty-six years, and a licensed real estate broker for twenty-one years (R.T. 156). For fifteen years he had been an agent for the Utah Mortgage Loan Company. He was, at the time of the fire, a man of quite substantial means, having a net worth of about $98,000.00 (R.T. 162). Although he had several financial obligations practically all his debts were in a current condition. (R.T. 157-165).

The motel and furniture were not insured for substantially more than their value and the insurance adjuster for Appellant was present and helped Appellees compute their loss at the time the proof of loss was made out. (R.T. 79, 185.)

Appellee had had three fire losses prior to the one of June 11, 1963. There was a loss in approximately 1937 in Blackfoot, but apparently there was no insurance covering the loss. (R.T. 126). About 1960 a fire had occurred in a potato cellar while in the possession of Appellees' tenant (R.T. 130). And about 1953 a fire had occurred in the same motel. No money had been paid to Appellees, but the motel had been restored by the insurance company (R.T. 121, 122.)

Appellees at the close of all the evidence moved

the court for a directed verdict as to the issue of liability, which was granted as to that issue. Appellants appeal from the order granting the directed verdict and upon rulings of the court as to the admissibility of certain testimony and a written statement of Appellant's witness, Betty Oldham.

SUMMARY OF ARGUMENT

In Appellees' Argument each issue and specification of error argued by Appellant will be treated by Appellees, as far as possible, in the same order as treated by Appellant.

Appellees are not taking issue with appellant's contention that the fire was of incendiary origin, nor did they at the trial. Therefore this issue will merely be commented upon.

Appellees contend that there was no evidence adduced at the trial which would prove, or tend to prove, that Appellees, or either of them set the fire, conspired to set it, or in any manner caused it to be set. Appellees further contend that there was no evidence which would prove, or tend to prove, fraud, concealment, filing of a false proof of loss, or any other violation of the policy.

Appellees recognize that circumstantial evidence can be the basis of proof in a civil case involving an incendiary fire, but Appellees contend that Appellant fell far short of presenting a case upon which the triers of the fact could properly infer that Appellees were guilty of setting this fire, or causing it to be set. Of course, if Appellees were not guilty as to the setting of the fire, they were not guilty of the other charges.

No evidence was adduced that either of the Appellees

was within ninety miles of the motel when the fire was set, and certainly there was no evidence adduced that Appellees conspired with others to set the fire. The only evidence bearing upon Appellees' whereabouts when the fire was set placed them in Jerome, Idaho, and Shoshone, Idaho, over ninety miles from the motel.

No evidence was adduced at the trial in any manner connecting Appellees with the inflammable liquids, rags, and other properties apparently used to set and spread the fire.

No evidence was adduced at the trial tending to show that Appellees were the only persons who had access to the motel units. In fact much evidence was adduced by Appellant's own witnesses, and uncontradicted, that unknown persons could have readily gained access to all four units on the night of the fire.

And there were at least four facts established at the trial, and uncontroverted, that an unknown person or persons did enter the motel units on that night. It was proven that a bucket or kettle had been placed upside down under an unlocked window in the motel through which entrance could be rather readily gained to the fourth unit. It was proven that the covers to the ceiling openings in the units had been removed, thus affording access to all units through a common attic. It was proven that items of metal furniture had been removed from two apartments. It was proven that empty beer and whiskey bottles were found in an unoccupied apartment, although the apartment had been cleaned and inspected some two days before the fire.

In attempting to establish motive on the part of Appellees much evidence was adduced concerning the

financial circumstances of Appellees. However, Appellant succeeded only in showing that Appellee Jones was a man of diverse business interests who financed the purchase of much of his property and the conduct of his business activities, but who was substantially current in the payment of his obligations and who had a net worth of some $98,000.00. He is a family man who has held responsible trusts for many years in his community, and certainly Appellant's proof did not establish motive for Appellees to commit arson under these circumstances.

Appellant contends that it was error not to permit Appellant to impeach its own witness, Betty Oldham, by introducing evidence of her prior inconsistent statements. Appellees contend that no foundation was laid justifying the admission of such impeaching evidence in that this witness' testimony was wholly negative and not in any way damaging to Appellant's case. The testimony of this witness neither helped nor harmed Appellant's case, and no surprise or prejudice was shown concerning it. Also Appellees contend that no amount of impeachment of this witness could have strengthened Appellant's case whatever for the reason that impeachment evidence cannot be received for the purpose of establishing the truth of anything contained therein, but solely for the purpose of discrediting the witness. No purpose could have been served by discrediting this witness further.

Plaintiff's Exhibit No. 10, the statement of the witness Betty Oldham, was not admissible in evidence because it was hearsay, not being made under oath, or subject to cross examination; nor did the witness testify that she knew the matters contained in the statement to be true, either at the time the statement was

made or at the time of trial. Therefore, the statement was inadmissible under any theory.

The Appellant had the burden of proof in establishing that Appellees set the fire. They failed to prove any of the elements necessary to establish guilt directly or by circumstancial evidence and failed to prove a prima facie case.

ARGUMENT

I. Idaho Rules of Law Applicable.

Appellees take no issue with Appellant's position that the Federal District Court shall apply the applicable State law governing questions of burden of proof, presumptions, sufficiency of evidence and interpretation of rights and obligations under the insurance policy, and Appellees urge that this is the law.

A. Idaho Rules on Motions for Directed Verdicts.

Appellees take no issue with Appellant as to the general rule governing the granting of directed verdicts in Idaho, except that the full rule is not stated in Appellant's Brief. It should be observed that directed verdicts in Idaho have been frequently granted when the undisputed evidence is so conclusive that reasonable minds could not arrive at different conclusions as to the facts or inferences to be drawn therefrom.

The full statement of the rule in Idaho governing the taking of a case from the consideration of the jury is contained in Alsup v. Saratoga Hotel, 71 Idaho 229, 229 P. 2d. 985. The Court stated:

> "The rule is that where the minds of reasonable men might differ or where different conclusions might be reached, the question of negligence, contributory negligence and proximate cause, is for the jury. Where the facts are in dispute, it is the province of the jury, or trier of facts, to find on such conflicting evidence. Ford v. Connell, 69 Idaho 183, 204 P. 2d 1019. Conversely, where the undisputed evidence is so conclusive that reasonable minds could not arrive at different conclusions

> as to the facts or inferences to be drawn therefrom, it is proper for the court to take the case from the jury. 38 Am. Jur. 1046, 345."

In a malicious prosecution case, Thomas v. Hinton, 76 Idaho 337, 281 P. 2d. 1050, the Idaho Court stated the rule as follows:

> "The establishment of a prima facie case of want of probable cause does not shift the burden of proof to the defendant in the action, nor does it make the question one of sufficiency or weight of the evidence so that the trial court cannot take the case from the jury and enter judgment for the defendant (appellant) as a matter of law, if the evidence is so clear and undisputed that all reasonable minds must reach the same conclusion therefrom."

In a recent malpractice case, Hale v. Henninger, 87 Idaho 414, 393 P. 2d. 718, the grounds for granting a directed verdict were stated as follows:

> "On the basis of the testimony above discussed, we are constrained to the view that reasonable and fair-minded men could not have differed as to the inferences and conclusions to be drawn therefrom, Splinter v. City of Nampa, 74 Idaho 1, 256 P. 2d 215 (1953); Byington v. Horton, 61 Idaho 389, 102 P. 2d 652 (1940) and that the trial court was correct in granting respondents' motions for a directed verdict. The evidence presented by appellant was insufficient, as a matter of law, 'to establish his entitlement to recovery under any view which could be properly taken of the evidence.' Shaffer v. Adams, 85 Idaho 258, 263-264, 378 P. 2d 816, 818 (1963); Smith v. Big Lost River Irrigation

District, 83 Idaho 374, 364 P. 2d 146 (1961); I.R.C. P. 41 (b); Sturgis v. Garrett, 85 Idaho 364, 379 P. 2d 658 (1963); Nissula v. Southern Idaho Timber Protective Ass'n., 73 Idaho 37, 245 P. 2d 400 (1952)."

In the trial court Appellant had the burden of proof on the issue that Appellees had set the fire, or caused it to be set. Under the above rules, when at the close of all the testimony, there was not any competent evidence adduced which tended to prove, either directly or indirectly, that Appellees had set the fire, or caused it to be set, the court properly took this issue from the consideration of the jury.

It is important to observe that had all the testimony of Appellees been disregarded, there is still a complete failure in the evidence to connect Appellees with the setting of the fire.

B. The Idaho Rule Governing Proof of Facts by Circumstantial Evidence.

The Idaho Court has apparently never been called upon to decide a case directly in point, involving determination of the origin of a fire in a case where the proof consists of circumstantial evidence.

In Splinter v. City of Nampa, 74 Idaho 1, 256 P. 2d 215, the Court in a negligence case stated:

> "Circumstantial evidence is competent to establish negligence and proximate cause. Facts, which are essential to a liability for negligence, may be inferred from circumstances which are established by evidence. But, where circumstantial evidence is relied upon, the circumstances must be proved, and not themselves be left to presumption or inference. This court has held that inference cannot

be based upon inference, nor presumption on presumption.

"The underlying principle applicable here is that a verdict cannot rest on conjecture; that where a party seeks to establish a liability by circumstantial evidence, he must establish circumstances of such nature and so related to each other that his theory of liability is the more reasonable conclusion to be drawn therefrom; and that where the proven facts are equally consistent with the absence, as with the existence, of negligence on the part of defendant, the plaintiff has not carried the burden of proof and cannot recover."

Again, in Dent v. Hardware Mutual Casualty Co., 86 Idaho 427, 388 P. 2d. 89, a suit on an insurance policy, the Idaho Court reaffirmed the above rules governing the proof of facts by circumstantial evidence and called attention to Anno. 95 A.L.R., Subd. III, PP 181-192.

II. Incendiary Fire.

There will be no issue taken by Appellees as to Appellant's contention that the fire was of incendiary origin. Appellant's agents had boarded up the motel before Appellees returned from their trip, and Appellees had no real opportunity to form an opinion as to the origin of the fires. It must be conceded that there was ample evidence adduced at the trial to establish the incendiary nature of the fire.

III. Evidence was not Sufficient to Sustain Verdict that Appellees wilfully caused the Fire.

There is no doubt that circumstantial evidence, when sufficient, may establish the identity of the person setting an incendiary fire. The circumstances which are

generally held to be relevant are: Opportunity; exclusive access to the premises; motive; and statements and conduct tending to connect the person with the arson.

Appellees contend that none of those circumstances were themselves proven according to the rules governing circumstantial evidence as laid down in the case of Splinter v. City of Nampa, Supra.

A. No proof of opportunity to set the Fire.

The last time either of the Appellees were in the motel prior to the fire was Saturday, two days before the fire. (R.T.203). Mrs. Jones was then cleaning the apartments for occupancy by tenants who had contracted to take three of the apartments at a later date. (R.T. 203). Mr. and Mrs. Jones left on a business trip, about 11:00 A.M., Monday, June 10, having business in Jerome, Idaho and vicinity and Caldwell, Idaho. (R.T. 212). They returned to Arco, Idaho, where the motel was located about seven in the evening of June 11, (R.T.215) The motel had burned in the early morning hours of June 11 while Appellees were in a motel in Shoshone, Idaho, approximately ninety miles from Arco. The fact that Appellees were doing business in Jerome and Wendell, Idaho, from about noon on June 10 until about 10:00 or 10:30 P.M. on that date was testified to by Eldon Handy, a real estate broker, (R.T. 225-228) his wife, (R.T. 235-236), and a Laura Hope (R.T. 230-233). On June 10, 1963,, Appellees registered for night lodging at a motel in Shoshone, Idaho (R.T. 257). They were assigned the last unit available in the motel (R.T. 260). The registration card (Plaintiff's Ex. No. 12) did not have the time of registration filled in (R.T. 262). Mrs. Young, the owner of the motel, testified that Appellees registered at between five and five-

thirty P.M. of June 10 (R.T. 258). Appellees testified that they registered for the night at the motel after finishing their business with Mr. Handy at about 11:00 P.M. (R.T. 177). It is submitted that this is the only substantial conflict in the evidence adduced at the trial. The owner of the motel testified that she saw the vehicle of Mr. Jones parked at their rented unit at about seven in the morning following their registration, (R.T. 261) and the motel apartment had been used. (R.T. 266). Appellees left the motel at about seven in the morning and drove to Caldwell, Idaho.

There is no evidence in the record whatever which tends to prove that Appellees, or either of them, were in the vicinity of Arco, Idaho, between the morning of the 10th of June and the afternoon of the 11th of June. The unimpeached testimony of several witnesses corroborates the testimony of Appellees that they were not nearer than ninety miles from Arco during any of that time.

Appellant's witness, Betty Oldham, testified that she "might have" seen a red and white Ford parked near her home on the night of the fire (R.T.43), but she was quick and steadfast in explaining that she did not know whether one was there or not. The testimony of this witness was wholly negative and added nothing to Appellant's case.

B. The Motel Could Be Readily Entered By Third Parties.

Perhaps the most important circumstance in any arson case linking the insured with the fire is his exclusive means of access to the premises. A careful review of the cases reveals that this circumstance is frequently the controlling element of proof. However, in the case at bar it was proven rather conclusively

that third persons could readily enter all apartments by way of an unlocked window, and indeed, it appeared they had. The Fire Chief and the insurance adjustor both testified that a can or kettle was found upside down under the unlocked window (R.T.34, 35, 77). Once a person had entered through the window, he could gain access to all four apartments (R.T. 31, 32, 33). Evidence of theft from the motel was adduced; (R.T. 210,211) and empty beer bottles and whiskey bottles were found in the motel after the fire (R.T. 35, 38, 39).

It would appear, then, that the evidence sustains the theory of access and entry by unkown persons just as readily as it sustains access by the Appellees.

C. There was no Substantial Motive shown on the Part of Appellees.

Appellee Jones was a family man of substantial means and had many varied business interests. He held many positions of trust, and owned several parcels of real estate. He had been licensed both as a realtor and an auctioneer for many years, and he was an agent for a mortgage loan company. Much effort was devoted at the trial by Appellant in an effort to discredit his financial statement, but with little success. Mr. Jones had collected on two fire losses in some twelve years. A fire had occurred in the same motel in 1953. No money had been paid to Appellees, but the motel had been restored by the insurance company. (R.T. 121, 122). No evidence was adduced in any manner casting any suspicion upon the bona fides of these fire losses.

When the evidence concerning Appellees' background and business activities is reviewed, it is hard to imagine any persons having a lesser motive than Appellees for committing the crime of arson.

The fire insurance policy had been obtained in October, 1961. (R.T. 291). The fire did not occur for more than a year and a half later. The amount of the insurance was not disproportionate to the value of the property insured.

D. Conduct and Statements of Appellees Did Not Tend To Show Guilt or Guilty Knowledge on their Part.

Appellant thoroughly investigated this case even to employing a Special Agent of the National Board of Fire Underwriters, yet no inconsistency was ever found in the conduct or statements of Appellees, and no substantial conflict appeared in the evidence. Appellant contends that there was something strange about Appellee's conduct in remaining for about an hour in Caldwell after learning of the fire and in stopping in Shoshone on the way home to pick up a receipt for the motel expense. Appellees had just driven some two hundred miles from Shoshone to Caldwell (R.T. 178). They stayed in Caldwell only about an hour (R.T. 180) and "headed right back to Arco" although they had intended to transact some business and to go fishing (R.T. 214). There was nothing about the motel situation by the time they heard about the fire that could be helped by speeding up their trip home, although they arrived in Arco at about 7:00 P.M., having driven some two hundred ninety miles from Caldwell that afternoon. Also there was nothing strange about a business man stopping to pick up his receipt for income tax purposes. Mr. Jones explained how he had happened to miss picking up the receipt the night before (R.T. 178).

Appellant implies that it was a suspicious circumstance that Mr. Jones called his attorney. Actually it

would have been strange had he not done so under the circumstances. The insurance agent boarded up the motel without any authority from the owners before they arrived and left word that the owners were not to enter. (R.T. 72-75). Mr. Jones called the insurance adjuster about the same time he called his attorney, and Mr. Jones was complaining bitterly of the treatment he was receiving. (R.T. 78).

If there was any strange or suspicious conduct, it was on the part of the insurance adjuster. The insurance adjuster actually helped Appellee fill out his proof of loss, and then Appellant charged Appellees with fraud in connection with the proof of loss at the trial.

At the close of all the evidence the court was called upon to decide whether or not Appellant had presented sufficient evidence tending to prove that Appellees wilfully set the fire and defrauded Appellant to permit the issue to go to the jury. The Court followed the law of Idaho governing the proof of facts by circumstantial evidence and had to conclude that the evidence was wholly insufficient to sustain a verdict against Appellees.

The Court was mindful of the case of Dent. v. Hardware Mutual Casualty Co., 86 Idaho 427, 388 P. 2d 89, wherein the Court lays the rule down in these words:

> "The underlying principle applicable here is that a verdict cannot rest on conjecture; that where a party seeks to establish a liability by circumstantial evidence, he must establish circumstances of such nature and so related to each other that his theory of liability is the more reasonable conclusion to be drawn therefrom; and that where the

proven facts are equally consistent with the absence, as with the existence, of negligence on the part of defendant, the plaintiff has not carried the burden of proof and cannot recover. (Citations).

"Where it remains equally probable from a consideration of all the evidence, that the injury resulted from the cause suggested by the defendant, as from that suggested by the plaintiff, the plaintiff has not established his case."

Mindful of the substantive law of Idaho concerning the requirements of proof in circumstantial evidence cases, the Court addressed himself to the motion for directed verdict on liability (R.T. 288) as follows:

"I will have to admit there is evidence in the record which might cause somebody to suspect something. It is like charging somebody with a crime. There is the suspicion and here the insurance company has done just that, but in the opinion of the court there is no evidence in the record which would connect these defendants with setting the fire. There may be some circumstances which might cause somebody to question whether they were at a certain place at a certain time, but as to the liability question, I don't think the insurance company has shown that these people had anything to do with setting the fire. The evidence shows that it was a set fire, but I can't see how, even on instructions to the jury, how this court can submit the question to the jury and consequently, I am going to instruct the jury and withdraw the question of liability from the jury, and instruct them that they should only find the damages. The motion is granted."

IV. It Was Not Error to Deny Appellant the Right Further to Impeach Its Own Witness, Betty Oldham.

At the trial Appellants called Betty Oldham as a witness.

She testified in part as follows (R.T. 42, 43, 44).

Q. Mrs. Oldham, did you see a car parked in the area around the Jones Home?

Mr. Smith: We object, it is leading.

The Court: She may answer "yes" or "no".

The Witness: When I were walking up the sidewalk—

The Court: Answer "yes" or "no" if you saw a car parked.

The Witness: No Sir.

By Mr. Merrill:

Q. Did you see a car parked around your home, or the Jones home that night?

A. People that live there.

Q. Did you see a red and white car there.?

A. I might have, I don't remember.

Q. You say that you might have, could you tell us what you did as you left the club and continued toward your home?

A. I just walked up the highway — the sidewalk — and went home.

Q. And you say that you might have seen a red and white Ford there?

Mr. Smith: We object. I don't think she testified that she might have.

The Court: She said she might have. She has answered the question.

By Mr. Merrill:

Q. Did you go over to the car there?

A. No, sir, I didn't go over to a car.

Q. Was there one there?

A. There was cars setting around there all of the time. They are living there.

Q. Didn't you go over and strike a match to see the license plate of a car?

Mr. Smith: Objection, its leading.

The Court: She may answer "yes" or "no".

The Witness: No, sir.

By Mr. Merrill:

Q. You never did that?

A. I strike matches, there is bushes when its dark.

Q. The question is, you never did strike a match to look at the license plate of a car?

A. I have.

Q. This night, or the early morning?

A. I don't remember if it was that night or some other night — I was drinking.

Q. Have you discussed these things with a Mr. Kennedy that I have been questioning you about?

A. Some of them. I don't know.

Q. Did you give a written statement concerning this?

A. He wrote down something.

Her entire testimony when boiled down is that:

(a) She did not remember what occurred on the night of the fire because she had been drinking beer. She had been in the club from sometime in the afternoon until after one o'clock at night. (R.T. 46, 53, 55).

(b) She had signed a statement later but she hadn't read it. (R.T. 45).

(c) She was sick when she signed the statement. (R.T. 47).

(d) She told the Sheriff and the Chief of Police before the trial that she could not remember what happened on the night of the fire because she had been drinking. (R.T.55).

(e) She could not, and would not, affirm the truth of the matters in the written statement because she had been drinking when she came home on the night of the fire.

The witness was questioned at great length on the statement, but the statement was not admitted in evidence. This ruling was correct under either the State Rule or the Federal Rule.

The Idaho Rule is laid down in Bodenhamer v. Pacific F. & P. Co., 50 Idaho 248, 295 Pac. 243 as follows:

"C.S., 8036 reads:

> "The party producing a witness is not allowed to impeach his credit by evidence of bad character, but he may contradict him by other evidence, and may also show that he has made, at other times, statements inconsistent with his present testimony.
>
> "The rule is well settled that impeaching evidence of prior contradictory statements does not tend

to establish the truth of the matter contained therein. It can be considered only as tending to affect the credibility of the witness sought to be impeached thereby.

"The theory under which the impeaching evidence is admitted is that appellant was surprised at the unfavorable testimony given by the witness called by him, or the witness is hostile, or the party in calling him has been entrapped to his prejudice. But this rule does not extend to a mere failure to testify to all the facts he was expected to testify to. This is true in jurisdictions having statutes similar to ours. (6 Jones on Evidence, 2d ed., p. 4812) See Agalianos v. American Cent. Ins. Co., 62 Cal. App. 349, 217 Pac. 107, 113 holding that the testimony must be damaging and prejudicial. It must be damaging, not merely negative. (People v. Floyd, 78 Cal. App. 11, 247 Pac. 917).

"In the instant case, the witness Brown did not testify unfavorably to appellant; he simply failed to testify as strongly for it as it was anticipated he would testify. Neither does it appear that appellant was entrapped into calling him, nor that the witness was in fact hostile. In any event, the only possible effect of the rejected evidence was to impeach the witness Brown. If we consider all of Brown's testimony as neutralized, there is still no sufficient evidence in the record to sustain appellants contention that Bodenhamer consented to the sale to appellant, or waived the lien of his mortgage as against appellant's cash advances. It does not appear from the record that appellant's defense failed by reason of the exclusion of this evidence, or that the evidence admitted,

> together with that rejected, established such defense. The error, if it was error, is therefore not prejudicial and the case should not be reversed on that account."

The statute quoted above is the same statute as the present Section 9-1207, Idaho Code, cited by Appellant. The Idaho Court reaffirmed the interpretation of this statute in a 1960 case, Wurm v. Pulice, 82 Idaho 359, 353 P. 2d 1071.

Under the above rule, further impeachment was inadmissible because the testimony of Betty Oldham was entirely negative and did not damage Appellant's case in the least. This witness merely failed to add anything to Appellant's case.

Naturally, since impeachment evidence cannot be admitted to prove the truth of the matters contained therein, the statement could not in any manner have strengthened Appellant's case had it been admitted. No prejudice could possibly have resulted to Appellant by its exclusion.

Under the Federal Rule the trial court is given discretion to permit impeachment of one's own witness upon a showing of real surprise. An exception to the rule requiring a showing of real surprise is in criminal cases wherein the government is under an obligation to call the witness. This exception does not apply in the case at bar because this is a civil case. Of course, prior statements of an impeached witness are not admissible as substantive evidence in any case. The Federal Rule is clearly set forth in Stevens v. United States (9th Cir. 1958) 256 F. 2d 619. Of course there was no real showing of surprise in the trial court. (R.T. 147), and the Trial Judge properly exercised his

discretion in denying the further impeachment of Betty Oldham.

V. The Statement of Betty Oldham, Exhibit No. 10, was not admissible as a Record of Past Recollection.

Appellant in its brief is also urging that the statement of Betty Oldham should have been admitted to prove the truth of the matters stated therein. This is a surprising position for Appellant to be taking in view of the testimony of Betty Oldham concerning the written statement. This witness was not stating that she knew the statement was true when she made it. She clearly and certainly testified that the events of the night of the fire were not in her memory because she had been drinking that day.

Appellant is now trying to put a changed meaning into her testimony. It is urging that the witness testified that she knew the things in the statement were true when she signed it, but now she cannot remember. She testified that she was ill when she signed it; that she did not read it; and that she could not remember the events of the night of the fire because she was **then** drinking. She, of course, repudiated the statement before the Sheriff and the Chief of Police. The Sheriff testified concerning the repudiation and largely corroborated Betty Oldham's testimony as to why the statement was incorrect. Her recollection of what occurred, and what she had observed on the night of the fire was not accurate. (R.T.102,103,104).

It is plain, then, that this statement did not qualify as a Record of Past Recollection, and as an exception to the hearsay rule, because the impairment of the faculty of memory of the witness occurred during

the time she was supposed to have been making her original observations, not at the time of trial. This difference makes all of Appellant's citations as to admissibility of a Record of Past Recollection beside the point. Of course, the Court permitted the witness to refresh her memory by reading the statement to herself while she was on the stand (R.T. 44, 45), but her memory was not refreshed and she continued to deny the truth of the things in the statement because, "I don't remember — I had been Drinking — I Don't remember." (R.T. 46).

CONCLUSION

It is respectfully submitted that Exhibit 10 was inadmissible for any purpose; and certainly under any view of the law no prejudice resulted to Appellant by its exclusion since it could not be used to prove the truth of anything stated therein. All of the evidence adduced at the trial did not warrant submission of the issue of liability to the jury, and any verdict against Appellees based thereon could not stand. It follows that the trial court properly took the issue of liability from the jury, and that the judgment should be affirmed.

Respectfully submitted,

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CERTIFICATION

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the 9th Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

A. L. SMITH